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In the

SUPREME COURT OF THE UNITED STATES

John N. Sweeney

Petitioner,

v.

Commissioner of Internal Revenue

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for
the Eleventh Circuit

PETITION FOR REHEARING

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INTRODUCTION

Petitioner asks this Court to reconsider the holding in *Dole v. United Steelworkers*, 494 U.S. 26,33 (1990) that typical information collection requests are tax forms such as the 1040 and reaffirm this holding applies to the Paperwork Reduction Act of 1995 as it did the Act of 1980. Since holding tax forms are subject to the public protection, 44 U.S.C. § 3512(1980), a division of the U.S. Circuit Courts and Tax Court has appeared, both directly after the Dole decision, and now this division has grown to such proportions that the Department of Justice is promoting the divided authority as a green light to continue to disregard Congress and its mandate that all persons are to be told, before they have to answer any questions, orally or in writing, advanced by any Agency, including the Internal Revenue Service, why the Agency is requesting the information sought on their form, how the answers to those questions are intended

to be used, whether the target's response is voluntary or mandatory, and the fact no person is required to answer any question unless the form of questions displays compliance with the Paperwork Reduction Act of 1995(during Dole, 1980).

Even if this Court is unwilling to consider the affect the Paperwork Reduction Act of 1995 has on its 1990 Dole decision, which Congress said was intended to overturn the Dole decision in regard to third party requests not being covered by the 1980 Act's public protection, the fundamental principal that no person should be required to provide answers to questions until that person fully understands the conditions which attach to the usage of those answers must be addressed because there is no way a person can know whether to claim the protection of the Fifth Amendment until such time as the Agency seeking the information has fully disclosed its intentions for the information it seeks.

1. The United States is continuing to advance knowingly conflicting theories regarding the requirement to provide information to the IRS on Form 1040, before this very Court, opposing other theories the same United States is knowingly advancing while they are before other Circuits and even lower District Courts with the Eleventh Circuit.

Recently, on the Solicitor General filed a brief before this Court in United States v. Clayton, 07-904, in which the United States argued:

> "Petitioner suggests in passing (Pet. 18) that the decision below conflicts with *Christensen* v. *Harris County*, 529 U.S. 576 (2000), "by giving to a number calculated by the [Department of Labor] and published only on the Internet and in a few financial newspapers and periodicals the force and effect of law." But as already explained, the decision below does not rest on a determination that the CPI, in and of itself, has the force of law. **What has the force of law is Section 6012**, and it is that statute that required petitioner to file a tax return."

On November 14, 2007, the 7th Circuit Court of Appeals issued its decision in U.S. v. Denny R.

Patridge,507 F.3d 1092, 1094, 1095 (7th Cir. 2007) In its consolidated decision, the 7th Circuit stated it was reaffirming its decision in *Salberg v. U.S.*, 969 F.2d 379, 384 (1991), which held the "obligation to file a tax return stems from 26 U.S.C. § 7203, not from any agency's demand. The Paperwork Reduction Act does not repeal § 7203."

The 9th Circuit in U.S. v. Priest, et al., 06-10438, decided July 5, 2007, likewise concluded that the 1995 PRA "does not limit the impact of Hicks (947 F. 2d 1356, 1359-60) because we there held that 'repeals by implication are not favored.'"

The 7th and 9th Circuit's decision are contrary to this Court's holding in *CIR v. Lane Wells Co.* 321, U.S. 219, 223 (1944) that "Congress has given discretion to the Commissioner to prescribe by regulations forms of returns and made it the duty of the taxpayer to comply." They also conflict with "Notwithstanding any other provision of law" and allow laws to withstand the protection's reach. See 3512(a)(1995)(and 1980).

The 7th and 9th Circuit opinions also are contrary to this Court's decision in *Dole v. United Steelworkers*, 494 U.S. 26, 33 (1990) which held "typical information collection requests include tax forms" and that the public is to be protected.

The 7th and 9th Circuit's opinion is also contrary to this Court's decision in *U.S. v. Hubbell*, 530 U.S. 27, 35 (2000) which held "incriminating evidence may be the by-product of obedience to a regulatory requirement."

The decision by the 7th and 9th Circuits completely rejected the direct words of the Paperwork Reduction Act of 1980 and 1995 which both begin at section 3512 "Not withstanding any other provision of law no person shall be subject to any penalty..." The 7th Circuit admits the term "return" is not defined by any Act of Congress and ignores the logical follow that is the request derives from regulations.

The 7th Circuit takes the leap by saying they have "no doubt that the IRS has complied with

the Paperwork Reduction Act." "The control number on Form 1040 appears on OMB's web site as a current, valid number; if this is wrong, it takes more than a lawyer's say-so to establish the proposition."

The 7th Circuit's position is contrary to the direct language of the Paperwork Reduction Act of 1995 as well as this Court's decision in Dole. The 1995 Act directs a "complete defense, bar, or otherwise" may be raised at any time. The protection would begin upon either a person's "say-so" or upon an Attorney claiming the protection for his client. Look at how the 7th Circuit handled the issue.

It threatened disbarment of the Patridge Attorney for raising the protection. There is no doubt the Form 1040 fails to contain any of the listed criteria promulgated by Congress at 44 U.S.C. § 3506(c)(1)(B)(1995) which among other things directs the Agency to inform the target the reason why the questions are being asked and

how the information is to be used. Issues the Patridge Panel completely ignored.

See also 5 U.S.C. §552(a) where Congress requires the same list of disclosure for the IRS as section 3506(c)(1)(B) of Title 44.

This Court said in Dole:

> "While the grammar of this text can be faulted, its meaning is clear: **the public is protected under the Paperwork Reduction Act** from paperwork regulations not issued in compliance with the Act, only when those regulations dictate that a person maintain information for an agency or provide information to an agency. **By its very terms, the statute's enforcement mechanism** does not apply to rules which require disclosure to a third party rather than to a federal agency." Id. at 40

Furthermore, the Patridge panel said "How any of this could block a conviction for tax evasion is a mystery."

The 10th Circuit has steadfastly remained[1] a strong proponent of the Dole holding with their most recent deposit on the reach of protection for the public in *USA v. Chisum*, 502 F.3d 1237 (10th Cir.2007) The Chisum Panel held:

C. The Paperwork Reduction Act (PRA)

> The PRA, 44 U.S.C. § 3501-20, precludes the imposition of any penalty against a person for "failing to comply with a collection of information" if either (1) it "does not display a valid control number" or (2) the agency fails to alert the person that he or she "is not required to respond to the collection of information unless it displays a valid control number." 44 U.S.C. § 3512(a). A § 3512(a) defense may be raised at any time. See id. § 3512(b). Tax forms are covered by the PRA. See Dole v. United Steelworkers of Am., 494 U.S. 26, 33 (1990).

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[1]Petitioner understands thus far the Tenth Circuit has actually given no relief under the 1980 or 1995 Act while they continue to direct where and when such relief is to be given.

> Mr. Chisum contends that "[s]ince there was no proof that Form 1040 was a lawful form under the [PRA], the trial court erred in failing to grant [his] request [at the sentencing hearing] to dismiss the indictment." Aplt. Br. at 29. But the PRA protects a person only "for failing to file information. It does not protect one who files information which is false." Collins, 920 F.2d at 630 n.13 (internal quotation marks omitted). The charges against Mr. Chisum were predicated on the filing of false information, not the failure to file. He is therefore not entitled to relief.

In *U.S. v. Collins*, 920 F.2d 619 (10th Cir. 1990) the 10th Circuit, prior to the 7th Circuit's decision in Salberg, stated

> [fn12]In *U.S. v. Tedder*, 787 F.2d 540, 542 (10th Cir. 1986), this court held that tax forms were not information collection requests subject to the Paperwork Reduction Act because the filing of income tax returns was

obligatory. **This holding[2] is superseded by the Supreme Court's analysis in Dole v. United Steelworkers,** ___ U.S. ___, 110 S.Ct. 929, 933, 108 L.Ed.2d 23 (1990), which included federal income tax forms within the category of information collection requests under the Act. Dole would also appear to call into question the holdings in Snyder v. IRS, 596 F. Supp. 240 (N.D.Ind. 1984) and Cameron v. IRS, 593 F. Supp. 1540 (N.D.Ind. 1984), aff'd 773 F.2d 126 (7th Cir. 1985), both of which held the Paperwork Reduction Act inapplicable to IRS forms. However, Dole does not contravene our recent holding in Lonsdale v. U.S., 919 F.2d 1440, 1444 (10th Cir. 1990) that IRS summonses do not constitute information requests under the Act because they are issued in the course of an investigation directed against a specific individual or entity. See 44 U.S.C. § 3518(c)(1)(B)(ii).

[fn13] In U.S. v. Weiss, 914 F.2d 1514, 1520-22 (2d Cir. 1990), the Second Circuit held that the Paperwork

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[2]No doubt Dole is a "Holding."

Reduction Act did not preclude prosecution for filing false medicare and Medicaid claims, despite the fact that the forms in question did not contain OMB control numbers. Distinguishing Smith, where defendants were prosecuted for failure to file a Plan of Operations with the Forest Service, the Second Circuit reasoned that the Act "`only protects a person from penalties for failing to files information It does not protect one who files information which is false.'" Id. at 1522 (quoting Funk, The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law, 24 Harv.J. on Legis. 1, 77 n. 411 (1987)) (emphasis in original). We recognize that because defendant was charged with tax evasion and not failure to file tax returns, he technically was not being prosecuted for failure to provide information. Had defendant's tax evasion been effectuated through the filing of falsified tax returns, Weiss would dictate that no Paperwork Reduction Defense would be available to him. **But because the provision of information in 1040 forms is inexorably linked to the statutory requirement to**

pay taxes, and defendant failed to file such forms, the Paperwork Reduction Act was applicable to such conduct. Emphasis added.

Petitioner claims the Chisum Panel is partly incorrect. The Chisum Panel nine months earlier held in *Pond v. CIR*, T.C. Memo 2005-255 WL 18928, decided January 4, 2007, Tax Court was wrong for directing Pond, by raising a defense against penalty and interest claims of the Secretary, he was acting in a frivolous manner.

The 7th Circuit in Patridge says it cannot understand how "tax evasion" and the public protection provision of the Paperwork Reduction Act are connected, describing this as a "mystery" while the 10th Circuit says Forms like the 1040 are "inexorably linked to the statutory requirement to pay taxes..." Collins, fn13, Chisum, pg. 12

The 1980 Act at issue in Collins and Dole protected the public from penalties for failing to maintain or provide information while the 1995 Act protects the public from failing to comply

with a collection of information. The 1995 Act also says the OMB number must be issued in "accordance with this chapter" and defense, bar or otherwise, can be raised at any time. Providing the wrong answer is synonymous with failing to comply.

Simply, the decisions show why this Court needs to address the reach of the public protection provided by Congress to the entire Country at 44 U.S.C. § 3512(a)(1995).

Then there is the Tax Court's refusal to accept the 10th Circuit's decision in Pond v. CIR. See *Wolcott v. CIR*, T.C. Memo. 2007-315. (fn.8)[3]

In another argument before the United States District Court for the Northern District of Georgia, in United States v. Jackson, 07-CR-108 ODE, on appeal to the Eleventh Circuit at 08-10651-D, Jackson, a former IRS Agent and CPA, charged with willfully failing to file information, the

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[3]Can Tax Court really reject the 10th Circuit's decision in Pond and Chisum?

United States and presumably with its Solicitor General on board, told the Honorable Honorable Orinda D. Evans that:

> As the Eleventh Circuit reasoned in United States v. Neff, 954 F.2d 698, 699-700 (11th Cir. 1992), Congress created the defendant's duty to file federal income tax returns; Congress did not enact the Paperwork Reduction Act's "public protection" provision to allow OMB to abrogate any duty imposed by Congress; and so, the Paperwork Reduction Act provides the defendant no refuge for her statutorily-imposed duty to file federal income tax returns or from the imposition of a criminal penalty with a sentence of imprisonment on her conviction for willful failure to do so. See United States v. Dawes, 951 F.2d 1189, 1191-1193 (10th Cir. 1991). The defendant was convicted for non-compliance with the statutory requirement imposed by 26 U.S.C. § 7203, not by any form or regulation. See United States v. Kerwin, 945 F.2d 92 (5th Cir. 1991)(the Paperwork Reduction Act does not apply to the statutory requirement that a taxpayer must file a return). The explicit statutory requirement to file a tax return is not subject to the Paperwork Reduction Act. United States v. Dawes, 951 F.2d at 1191-

> 1192. The Act was not meant to provide criminals with an all purpose escape hatch. United States v. Hicks, 947 F.2d 1356, 1359 (9th Cir. 1991). **In fact, Section 7203 does not require the use of a Form 1040 for a person make a "return" of income. All that is required is a complete and candid return of income. See United States v. Patridge, 507 F.3d 1092, 1094, 1095 (7th Cir. 2007); Salberg v. United States, 969 F.2d 379, 384 (7th Cir. 1992) and the cases cited therein.**

Add. 6-7

This goes to show that the people's representatives have written a law, that intends to protect the public, that is not protecting the public, because Judges in the lower and appellate Courts are being misled by the United States Department of Justice.

As Chief Judge Easterbrook said in Patridge, "For that matter, many tax lawyers (and most judges) could not rattle off the citations without glancing at a book." Supra

Describing an attempt to understand the requirements the "proliferation of statutes and

regulations" made to understand the tax code by "glancing at a book" is ridiculous.

What book did Chief Judge Easterbrook look at in Patridge? You may be able to ascertain "the code" but that is as close as you get. What book did the Solicitor General glance at in Clayton? He does not say. What book does the Commissioner glance at when he writes instructions for his forms? He says "and their regulations" and never mentions section 7203. What about OMB? What book do they get their 5 CFR 1320 "6011" theory" from? They don't say.

Yet, the outcome with regard to the public protection is all the same. No relief. The Chisum Court said the public protection applies to "failing to file information" but not to "filing information which is false." Supra

Soon, Bivens actions will be brought against Government actors for intentionally violating the Paperwork Reduction Act of 1995 and their only defense will be qualified immunity. This immunity will not save their intentional violations of law because they would have to say they knew what

the law said but some Court decisions told them to ignore the law. That will not work under Harlow v. Fitzgerald, 457 U.S. 800, (1982).

When former IRS Agent Jackson followed the Chisum panel and raised the protection, the District Court stated that since Chisum did not get relief for providing information which is false, Jackson does not get relief for failing to file information. That should leave this Court scratching its head.

The relationship between Government and the Public involving gathering information and usage of same is in need of specific uniform enforcement, and to which blatant error of Constitutional proportion exists in the refusal of the U.S. Department of Justice, Commissioner of I.R.S., U.S. Tax Court, U.S. District Court and the several U.S. Court of Appeals, in rejecting both the law, history and decisions governing the Paperwork Work Reduction Act of both 1980,1995, and the reasons both acts arose in the first place.

With many violations comes many cases which can be prevented by granting this Petition for Rehearing.

CONCLUSION

For the foregoing reasons Petitioner requests[4] this Court to Grant his Petition for Rehearing and fix the means and manner in which the public is protected by the Paperwork Reduction Act with specific uniform finding on the requirement to provide information to the IRS, or any agency, on any Form, and to reject the plethora of statutory origin theories which only prove there is no such theory.

Respectfully Submitted

March 13, 2008 John N. Sweeney

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[4]Demands is a more fitting term.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Petition for Rehearing is presented in good faith and not for the purpose of any delay, whatsoever, and is limited to substantial and controlling issues involving recent decisions by both the 7th, 9th and 10th Circuit, which were not available[5] to Petitioner at the time his Petition for Writ of Certiorari was filed with this Court and to which divide this nation on the application and reach of the Paperwork Reduction Act of 1995 only strengthening why this Court should Grand this Petition for Rehearing.

/s/John N. Sweeney

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[5]Save the 9th in Priest

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	: February 13, 2008 : CRIMINAL ACTION
v.	:
	: NO. 1:07-CR-108- :ODE
SHERRY PEEL JACKSON	:

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION REGARDING 18 U.S.C. § 4083

Comes now the United States of America, by and through counsel, David E. Nahmias, United States Attorney, and Richard M. Langway, Assistant United States Attorney for the Northern District of Georgia, responding to defendant's motion regarding 18 U.S.C. § 4083 as follows:

1.The defendant's contention that she should not be sentenced to a term of imprisonment or be subjected to any "penalty" on her convictions for violation of Title 26, Section 7203, based on her construction of Title 18, United States Code, Section 4083, and the Paperwork Reduction Act, 44 U.S.C. § 3512, is frivolous. This contention is no more than a repetition of

constructions of the law advanced by federal income tax non-filers convicted for violation of Section 7203, which have been repeatedly rejected by the courts since the 1980's. In particular, the defendant's construction of 18 U.S.C. 4083 was rejected by the court in United States v. Hanyard, 746 F.2d 226, 1229 (5th Cir. 1985). In Hanyard, the defendant contended that 18 U.S.C. § 4083 prohibited his confinement to a federal prison camp. The court rejected that contention, holding that since the purpose of Section 4083, to prohibit confinement of misdemeanants to a penitentiary, was not violated by confining Hanyard to a federal prison camp, the district court did not abuse its discretion by sentencing him to confinement in a federal prison camp even if felons were also housed there. Her contentions relating to 44 U.S.C. § 3512 were rejected in United States v. Neff, 954 F.2d 698, 699-700 (11th Cir. 1992); United States v. Patridge, 507 F.3d 1092, 1094-1095 (7th Cir. 2007); and Salberg v. United States, 969 F.2d 379, 383-384 (7th Cir. 1992).

2. With regard to the maximum term of imprisonment

to which the defendant can be sentenced for her convictions, Title 26, Section 7203, authorizes a maximum term of imprisonment of one year upon conviction for each count of conviction. 26 U.S.C. § 7203, which defines the offense of willful failure to file a federal income tax return as a misdeameanor, does not specifically classify the misdemeanor offense by a letter grade. Title 18, United States Code, Section 3559 - Sentencing classification of offenses - provides that if an offense that is not specifically classified by letter grade in the section defining it, is a Class A misdemeanor if the maximum term of imprisonment authorized is one year or less but more than six months as in the case with a Section 7203 conviction. Title 18, Section 3581 - authorized terms of imprisonment - provides that a defendant who has been found guilty of a Class A misdemeanor may be sentenced to an authorized term of imprisonment of not more than one year.

3. As to the type of institution at which the defendant may be required to serve a sentence of imprisonment, Title 18, United States Code, Section

4083 - Penitentiary Imprisonment; Consent - directed to the Federal Bureau of Prisons - provides that a sentence for a misdemeanor, that is, an offense punishable by imprisonment for one year or less shall, shall not be served in a penitentiary without the consent of the defendant.

4. Accordingly, since the defendant was convicted of four separate misdemeanor offenses for willful failure to file income tax returns under Section 7203, defendant cannot be compelled to serve a sentence of imprisonment imposed by this court in a United States penitentiary, unless she consents. The Federal Bureau of Prisons may, however, designate the defendant to serve her sentence in an institution, other than in a United States Penitentiary, where persons in the custody of the Federal Bureau of Prisons may serve their sentences, such as a Federal Correctional Institution or a Federal Prison Camp, among others, enumerated in 28 C.F.R. § 500.1. See United States v. Hanyard, 762 F.2d 1226, 1228-1229 (5th Cir. 1985).

5. The defendant's contention that the term "penitentiary," for purposes of Title 18, United States Code, Section 4083, applies to any place where felons are placed to serve their time or any place where persons waiting to be sentenced or charged with felonies reside or where persons convicted of felonies currently await transition back into society is without merit. See United States v. Hanyard, 762 F.2d at 1229. As the Hanyard court noted, since the purpose of Section 4083, to prohibit confinement of misdemeanants to a penitentiary, is not violated by confining a defendant to a facility, such as a federal correctional institution or federal prison camp, the district court may properly commit the defendant to the custody of the Bureau of Prisons to be imprisoned at a Federal Bureau of Prisons institution, other than at a United States Penitentiary, on her convictions for violation of 26 U.S.C. § 7203.

6. Likewise, there is no merit to the defendant's suggestion that Paperwork Reduction Act, 44 U.S.C. § 3512, can affect the imposition of a penalty upon convictions for failure to file federal income tax returns

in violation of 26 U.S.C. § 7203, which provides criminal sanctions for failure to do so, because the IRS Forms 1040 do not comply with the Paperwork Reduction Act.

7. Defendant cites no case law that supports the proposition that the failure, if any, of a Form 1040 to display a control number assigned by OMB or expiration date would affect the imposition of a sentence, which includes imprisonment and a fine, by a federal court in a criminal tax case, upon convictions for violating Title 26, United States Code, Section 7203, for willful failure to file federal income tax returns. As the Eleventh Circuit reasoned in United States v. Neff, 954 F.2d 698, 699-700 (11th Cir. 1992), Congress created the defendant's duty to file federal income tax returns; Congress did not enact the Paperwork Reduction Act's "public protection" provision to allow OMB to abrogate any duty imposed by Congress; and so, the Paperwork Reduction Act provides the defendant no refuge for her statutorily-imposed duty to file federal income tax returns or from the imposition of a criminal penalty

with a sentence of imprisonment on her conviction for willful failure to do so. See United States v. Dawes, 951 F.2d 1189, 1191-1193 (10th Cir. 1991). The defendant was convicted for non-compliance with the statutory requirement imposed by 26 U.S.C. § 7203, not by any form or regulation. See United States v. Kerwin, 945 F.2d 92 (5th Cir. 1991)(the Paperwork Reduction Act does not apply to the statutory requirement that a taxpayer must file a return). The explicit statutory requirement to file a tax return is not subject to the Paperwork Reduction Act. United States v. Dawes, 951 F.2d at 1191-1192. The Act was not meant to provide criminals with an all purpose escape hatch. United States v. Hicks, 947 F.2d 1356, 1359 (9th Cir. 1991). In fact, Section 7203 does not require the use of a Form 1040 for a person make a "return" of income. All that is required is a complete and candid return of income. See United States v. Patridge, 507 F.3d 1092, 1094, 1095 (7th Cir. 2007); Salberg v. United States, 969 F.2d 379, 384 (7th Cir. 1992) and the cases cited therein.

8. Finally, the defendant's contention that the Forms

1040 for the years 2000, 2001, 2002, and 2003 failed to contain a "valid" control number and that the forms are invalid because they do not tell taxpayers that the lack of a valid control number means they do not need to supply any information or do not have an expiration date is frivolous. These contentions were addressed and rejected by the courts in United States v. Patridge, 507 F.3d 1092 at 1094-1095, Salberg v. United States, 969 F.2d 379, 383-384 (7th Cir. 1992), and United States v. Dawes, 951 F.2d 1189, 1193. In fact, the Forms 1040 for the years that the defendant failed to file a return bear a control number, namely, OMB No. 1545-0074, and an expiration date - the forms are designated by year, e.g., "2000," etc. Nothing more is required. Id.

Respectfully submitted,

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